BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Jurisdiction.

Jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code (U. S. C. § 347; 28 U. S. C. A. § 354) and Rule 38(c) of this Court. This Court has issued *certiorari* where division of opinion existed in the District of Columbia Court of Appeals: *Hartford Ins. Co.* v. *Wilson,* 187 U. S. 467, 23 S. Ct. 189; *Baker* v. *Cummings,* 181 U. S. 117, 21 S. Ct. 578; *Willis* v. *East'n. Trust,* 169 U. S. 295, 18 S. Ct. 347, and other cases collected in *Hughes Fed. Prac.* § 3415.

The points believed by petitioners to require reversal of the complained of decision are discussed below, *seriatim.*

1. The Decision is Based Upon an Erroneous Principle of Law.

The Court below stated in its opinion that—

> "The correct rule to be followed [in this case] is stated by a New York court in *Talbot's Will,* 170 Misc. 138, 9 N. Y. S. 2d 806, 812."

In the *Talbot* case the trustees had been authorized "to determine *all questions and matters of doubt*[5] arising in the execution of the trusts" there involved; whereas in the Lincoln Will the Executors are empowered "to decide finally *any question* that may arise as to what constitutes income and what principal, it being my wish, however, that whenever feasible their decision be in favor of the life-beneficiaries named herein."

The noun "question" is defined in Funk & Wagnalls Standard Dictionary as—

> "Subject of enquiry, investigation or debate; something to be enquired into; a matter to be decided or determined; a point at issue; a problem."

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[5] Italics have been supplied at various places in this paper.

Not only are the pertinent powers involved in the two cases expressed in wholly different language, but the *Talbot* case is but an unappealed Surrogate's opinion, whereas the true and controlling rule in New York has been announced by its Court of Appeals in *Chase National Bank* v. *Chicago Title & Trust Co.*, (Rockefeller Trust) 246 App. Div. 201, aff'd. 271 N. Y. 602, 3 N. E. (2d) 205. In the *Chase Bank* case the trustee, with the consent of an advisory committee, had been authorized—

> "to determine *all questions*, whether any monies, securities, properties, stock dividends, rights or other things, are to be treated as capital or income."

The trustee had distributed a large stock dividend wholly to corpus, although under the New York rule of construction stock dividends were required to be apportioned as between income and principal. The trustee had been admonished in the trust instrument to deal frugally with the life tenant —the antithesis of testatrix' expressed wish here—and the Court of Appeals upheld the trustee's action in departing from the established rule.

Professor Scott, in commenting upon this and certain related cases, has said (*Scott on Trusts*, 1939 Ed. § 233.5)—

> "The mere fact that the trustee does not follow the rules of construction which would be applicable if no such power were conferred upon him does not constitute an abuse of discretion. Indeed, the very purpose in conferring the power upon him is to enable him to depart from the usual rules."

The Supreme Judicial Court of Massachusetts has recently followed the principles of the *Chase Bank* case. In *Dumaine* v. *Dumaine*, 301 Mass. 214; 16 N. E. (2d) 625, the trust instrument provided that the trustee (who was also a life-beneficiary) should have full power and discretion to determine whether any money or other property received by him was principal or income. The trustee sold certain

stock shares at a profit, and asked instruction of the court whether he might distribute the profit as income. The court held that he was not bound to follow the ordinary rules as to allocation which would have been applicable in the absence of the discretionary power.

Petitioners submit that the complained of decision is, by its very terms, predicated upon the "rule" announced in a New York Surrogate's opinion and that the latter, in turn, is inconsistent with principles of law adopted by the highest courts of New York and Massachusetts.

It follows that the decision below is based upon an erroneous principle of law.

2. The Decision Ignores the Policy of the Law Favoring Distribution.

Since the decision of the High Court of Chancery in the leading case of *Thellusson* v. *Woodford*, 4 Ves. 227; 11 Ves. 112, which gave rise to the enactment by Parliament of the *Thellusson Act* (1800), the law has favored the distribution of trust income as against its accumulation. Recent years have witnessed, if anything, increasing impatience with income accumulations; yet the decision below, if unmodified, will render impotent a power created by decedent for the purpose of permitting her trustees to make income distributions to her loved children and grandchildren as against accumulations for probable corporate remaindermen.

3. The Court Below Failed to Consider and Determine a Decisive Point Raised by Petitioners.

Petitioners in their Brief on appeal submitted to the Court in their "Summary of Argument" the following proposition:

> "The intention of the testatrix is the polestar by which the Court is to be guided. The lower Court has found that intention in this case and has decreed accordingly. The Chancellor's finding will not be set

aside upon appeal unless it appears that there has been an error in law or a conclusion of fact unwarranted by the evidence."

The trial Justice made the following *finding of fact:*

> "The plain intention of the testatrix as to distribution of accretions to her estate was to conduce the distribution of all thereof, whenever possible, to her named life-beneficiaries—her children and grandchildren." (R. 121)

The Special Master had also found that testatrix intended distribution of the non-residuary income to her children and grandchildren.[6]

The Court failed to pass upon the proposition, deemed by petitioners to be determinative of their rights, that findings of fact are to be reversed on appeal only if wholly unsupported or obviously erroneous.[7]

4. The Lower Court Has Not Given Proper Effect to an Applicable Decision of this Honorable Court.

The record in this case clearly shows that the corporation declaring the stock dividend here involved used $10,000,000 of its 1937 net earnings to purchase its own Preferred Shares (then held by RFC) and, instead of distributing these shares, changed them into common stock which was apportioned among all shareholders. There was no dilution of the original shares.[8]

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[6] In this connection petitioners respectfully represent that the three Executors, the Special Master, the trial Justice and Mr. Justice Rutledge (dissenting) all adopt the view that testatrix *intended* distribution of the non-residuary income to her life-beneficiaries. Only Chief Justice Groner and Mr. Justice Stephens failed so to hold. The majority opinion, nonetheless, has established "the law of the case." If intention is indeed to be our guide, the course is clear: the decision should be reversed.

[7] *Colby* v. *Riggs Bank*, 67 App. D. C. 259, 273; 92 F. (2d) 183; also numerous cases collected 4 Fed. Dig. pp. 838, *et seq.*

[8] In the interest of brevity, no attempt is here made to demonstrate this postulation. The Record (pp. 72-99) amply supports it.

The *Gibbons* case (136 U. S. 549) does not establish the rule to be followed here; for there it was said—

> "A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property; the aggregate interests therein of all the shareholders are represented by the whole number of shares, and the proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones."

Perhaps it is not too much to say that in times of shifting economic trends the "stock dividend rule" as laid down in the *Gibbons* case (1890) is in need of modification; for "stock dividends" now cover a wide range: some are pure diffusions of capital; some represent true income; others are mixed. Certain it is, in any event, that no power existed under the will involved in the *Gibbons* case to determine matters of income and principal; indeed, upon death of the life tenant, the corpus of that trust was required to revert "without incumbrance or impeachment of waste."

Even in cases where no discretionary power to distribute is lodged in fiduciaries, the state authorities are in conflict as to allocation of stock dividends. Thus, to mention a few, there are the Pennsylvania, New York, Massachusetts, Kentucky and New Jersey stock dividend "rules."

In this case the Court below has erroneously given to the *Gibbons* decision a broader effect than is proper under the circumstances and in so doing has emasculated a power conferred by its very terms to enable decedent's trustees to favor those nearest and dearest in her affection.

Wherefore, your petitioners respectfully pray that a writ of *certiorari* may issue herein and, upon final hearing, the referred to decision of the United States Court of Appeals for the District of Columbia may be reversed and the cause remanded with appropriate instructions.

Respectfully submitted,

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